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IN THE
Supreme Court of the United States

OCTOBER, 1976

No.

76-1027

ROBERT J. HENDERSON, Superintendent of Auburn
Correctional Facility, Auburn, New York,

Petitioner,

against

ALFRED LEWIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Robert J. Henderson, Superintendent of the Auburn Correctional Facility, Auburn, New York, prays that a writ of certiorari issue to review two decisions of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Alfred Lewis v. Robert J. Henderson*, which were decided on June 4, 1975 and November 3, 1976.

Opinions Below

The first decision of the Court of Appeals which petitioner seeks to review is reported at 520 F. 2d 896 (June 4, 1975) cert. den. 420 U.S. 998 (December 1, 1975).^{*} The

^{*} This petition was brought by respondent herein.

opinion of the Court of Appeals is reproduced as Appendix A. The decision of the District Court which was affirmed in part and reversed in part by the Court of Appeals is unreported and set forth as Appendix B.

The second decision of the Court of Appeals, which petitioner seeks to review was a summary affirmance, dated November 3, 1976, of a memorandum decision and order of the United States District Court for the Southern District of New York dated July 16, 1976. The opinion of the District Court is reported at 421 F. Supp. 674. The decision of the Court of Appeals is set forth as Appendix C and the opinion of the District Court is set forth as Appendix D.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The second decision of the Court of Appeals was handed down November 3, 1976.

Questions Presented

1. Did the decision of the Court of Appeals ordering an evidentiary hearing conflict with holdings of this Court?
2. Did the finding of the Court of Appeals that the fact pattern alleged constituted a coerced confession conflict with the various decisions of this Court delineating the nature of coerced confessions?
3. Should this Court find that the introduction of respondent's confession, even if coerced, was harmless error?

Statement of the Case

Respondent is on parole from a judgment of conviction of the Bronx County Court, Bronx, New York, entered after a trial by jury on November 25, 1958 for robbery in the first degree, grand larceny in the first degree, and assault in the second degree. He was sentenced by the court (McCAFFREY, J.) to a term of from 30 to 60 years. The conviction was affirmed by the Appellate Division, 10 A D 2d 924 (1st Dept., 1960), and leave to appeal to the Court of Appeals was denied on July 15, 1960.

Respondent was arrested on the evening of February 17, 1958 on the complaint of a friend whom respondent had threatened. Respondent was arraigned on February 19, 1958 and appeared in court approximately 21 times prior to trial. Not until his third appearance in court, some 10 days after his confession, did he request a physical examination which was ordered by the court.

Respondent was committed for two psychiatric examinations prior to trial. The reports were never introduced at trial. Prior to trial, his attorney admitted that respondent was competent to stand trial.

Respondent made various *pro se* motions throughout the eight months prior to trial. Except for the time he requested a physical examination, he made no mention of any coercion.

At trial, seven eye-witnesses to the bank robbery and assault testified. The jury also heard the testimony of respondent's friend, who made the original complaint to the police, several detectives, and the doctor who had examined respondent after arrest. The robbery and assault occurred in broad daylight. Respondent wore no disguise.

Respondent testified only on *voir dire* about the nature of his confession. His testimony concerned only alleged

physical coercion and not any alleged mental coercion. Respondent did not otherwise testify in his defense and called no witnesses in his behalf.

An application for a writ of habeas corpus was denied on November 10, 1969 (SARAFITE, J.) and affirmed in 34 A D 2d 736 (1st Dept., 1970). Leave to appeal to the Court of Appeals was denied on June 15, 1970.

A post-trial *Huntley* hearing was held by the Supreme Court, Bronx County (McCAFFREY, J.). The court found respondent's confessions voluntary in a decision dated March 24, 1970. A copy of that decision is set forth as Appendix E herein.

At the hearing, the State introduced the trial testimony of two detectives and respondent's *voir dire* testimony. Respondent chose not to take the stand. His attorney stated that respondent requested him to state that the transcript relates "to all of the pertinent parts that have to do with the voluntariness or involuntariness of his confession". Two alleged witnesses to respondent's state prior to the confession testified for the respondent. Respondent presented no other direct evidence of mental or physical coercion. In rebuttal, the State presented the testimony of the two detectives who had testified at trial.

The *Huntley* court made extensive findings. It found that the testimony of the detectives and doctor was credible and that respondent's was not. It found that one or the other of the two detectives who had testified was with respondent almost the entire time between arrest and the giving of the confession and that respondent was not beaten.

Even though the court's final statement was phrased in terms of physical coercion, the court made findings relevant to respondent's claim of mental coercion. The court found that respondent was accompanied by a friend when he went with the detectives to retrieve the money, that the detectives did not make any threats or molest respondent

in any way, and that the respondent appeared to be in good mental and physical condition when he was transferred from one stationhouse to another, which was shortly before he confessed.

The decision was affirmed by the Appellate Division, 35 A D 2d 1086 (1st Dept., 1970). Leave to appeal to the Court of Appeals was denied on December 15, 1970.

An application for a *Huntley* re-hearing was denied by the Supreme Court, Bronx County (McCAFFREY, J.) in a decision dated March 15, 1973. Leave to appeal to the Appellate Division was denied on May 8, 1973.

Respondent first petitioned the federal courts for a writ of habeas corpus by application to the United States District Court for the Western District of New York. In an unreported decision (1970-322) dated June 28, 1971, the court (CURTIN, J.), after a study of the trial record, the record of the *Huntley* hearing and the briefs and other records of trial and appeal, found that petitioner's confession was made voluntarily. The United States Court of Appeals for the Second Circuit denied a certificate of probable cause on May 1, 1972. This Court denied certiorari, 409 U.S. 1045 (December 4, 1972).

The instant application was brought in the United States District Court for the Northern District of New York. The Court (PORR, J.) in an unreported decision, Appendix B hereto, without requesting a return from the State, found *inter alia*, that the respondent's confession was neither mentally nor physically coerced.

The United States Court of Appeals for the Second Circuit, Appendix A hereto, found that the respondent was precluded from alleging that his confession was the product of physical coercion, since that issue had been thoroughly considered by the state court. However, the court found that the *Huntley* court had not considered whether respondent's confession was the product of mental

coercion and held that if the respondent could prove certain facts, at an evidentiary hearing then his confession would be deemed the product of mental coercion.*

The Court of Appeals found that respondent's confession would be deemed the product of mental coercion, because of six sets of allegations:

- (a) youth and limited education;
- (b) an arrest in questionable circumstances;
- (c) all night questioning;
- (d) denial of sleep and food;
- (e) deception by false promises of help and
- (f) deprivation of the support of counsel and friends.

On remand, the District Court, in an opinion set forth as Appendix D found that the respondent's confession was the product of mental coercion. The Court of Appeals affirmed on the opinion of the District Court, see Appendix C hereto.

Reasons Why Certiorari Should Be Granted

A.

The first decision of the Court of Appeals ordering an evidentiary hearing conflicts with holdings of this Court

Since respondent had received a full and fair hearing on the nature of his confession in state court, and that court found that his confession was voluntary, the order of the Court of Appeals for an evidentiary hearing con-

* This Court denied Lewis' petition for certiorari, 423 U.S. 998, which was based on the theory that his confession was obviously involuntary and thus no evidentiary hearing was required.

flicts with *Townsend v. Sain*, 372 U.S. 293 (1963) and *LaVallee v. Delle Rose*, 410 U.S. 960 (1973). This is another illustration of the apparent disinclination of the Circuit Court to be bound by the doctrine pointed out in the *Delle Rose* case resulting in the present case of an old conviction being set aside upon doctrinal considerations having no merit.

Justice McCaffrey, in his decision after the post-trial *Huntley* hearing, found that respondent's confession was made voluntarily and was not physically coerced. Specific findings relevant to mental coercion were made. Respondent's attorney had explicitly argued the issue of mental coercion at the close of his argument. The testimony at the *Huntley* hearing and at the trial testimony introduced at that hearing demonstrates that respondent's confession was, at the least, voluntary by a preponderance of the evidence. See, *Lego v. Twomey*, 404 U.S. 477 (1972).

It is clear from state trial and *Huntley* hearing records that respondent confessed only when he was confronted with the fact that he could be indentified as to the gap between his front teeth and that one detective knew the words he used during the robbery. Respondent was no stranger to the criminal courts: he had a prior conviction for robbery in the second degree.

It must be assumed that the court, after the *Huntley* hearing, would have found respondent's confession involuntary had it believed respondent's allegations, *LaVallee v. Delle Rose*, *supra*. Respondent's attorney did raise the issue of mental coercion at the hearing. Although the court, in its decision after the hearing, did not present an exegis of constitutional law, it must be presumed that the correct standards of federal law were applied to the facts, since it decided the confession was voluntary. Respondent refused to testify at the *Huntley* hearing although provided an opportunity. He should not have been permitted to so testify at a federal hearing.

B.

The finding of the Court of Appeals that the fact pattern alleged constituted a coerced confession is erroneous and conflicts with the various decisions of this Court delineating the nature of coerced confessions

Respondent at the time of his arrest was twenty-two years old with a 9th grade education. *Haley v. Ohio*, 332 U.S. 596 (1948), cited by the court below, as a factor in the "totality of circumstances" equation is inapposite since Haley was a fifteen year old and this Court pointedly stated that the "tender age" of Haley was the significant factor.

Neither is there any indication of a person of immature mental age unlike Davis in *Davis v. North Carolina*, 384 U.S. 737 (1966) who was "an impoverished negro with a third or fourth grade education" whose low level of intelligence was specifically noted and commented upon even by the State trial court (*id.* at 742). Respondent was, according to a contemporaneous psychiatric report, of average intelligence and had a serious prior experience with the police. Contrast with *Clewis v. Texas*, 386 U.S. 707, 712 (1967).

Unlike *Clewis v. Texas*, *supra*, where the first incriminating statement "was secured following an initial taking into custody which was concededly not supported by probable cause" (*id.* at 711), respondent here was clearly arrested on a valid charge.

Unlike *Clewis v. Texas*, *supra*, there was nothing like the prolonged "stream of events" (*id.* at 710) of some nine days, indicating as this Court observed there, the interrogation (unlike the instant one) "was not intended merely to secure information, but was specifically designed to elicit a signed statement of 'the truth'" *i.e.*, "the police view of the truth" (*id.* at 711-12).

The testimony at the *Huntley* hearing indicated that respondent was free to sleep the night after arrest and prior to the confession, if he desired. He admitted at the hearing before the United States District Court that he made no request for food and the additional testimony shows he was offered food but refused it.

The quality of the evidence with respect to deception by alleged false promises of help does not preponderate in favor of such allegations. The facts in the instant case pale in comparison with those in *Lynum v. Illinois*, 372 U.S. 528 (1963) or the gruesome and macabre deception in *United States ex rel. Everett v. Murphy*, 329 F. 2d 68 (2d Cir. 1964) which dramatize the flimsiness of respondent's alleged claim of deception.

The finding of the courts below that respondent was helplessly isolated from friends and counsel also conflicts with the classic cases of this Court such as *Haynes v. Washington*, 373 U.S. 503 (1963) and *Haley v. Ohio*, *supra*.

The finding of the court below that the facts as alleged by respondent demonstrate the existence of a confession that was the product of mental coercion clearly conflicts with a long history of decisions of this Court.*

C.

This Court should find that the introduction of respondent's confession at trial, even if coerced, was harmless error

Notwithstanding prior holdings of this Court that where a coerced confession was introduced at trial, the error could

* In any event, respondent testified at the federal evidentiary hearing that he confessed because of the alleged beatings, an issue that the Court of Appeals found precluded by the *Huntley* hearing. Respondent has never satisfactorily explained the discrepancy between this testimony and the finding of the Court of Appeals that his confession was not the product of physical coercion.

not be harmless, *e.g.* *Rogers v. Richmond*, 365 U.S. 534 (1961); *Payne v. Arkansas*, 356 U.S. 560 (1959); see *Chapman v. California*, 386 U.S. 18 (1967), this Court has retreated from that absolute position in *Milton v. Wainwright*, 407 U.S. 371 (1972).

In *Milton, supra*, the State introduced a confession obtained by a police officer who posed as a fellow prisoner and was confined in the cell with the respondent. According to the dissent, it took thirty-six hours of prodding to induce the respondent to talk. The respondent was represented by counsel. This Court found that the introduction of the confession was harmless beyond a reasonable doubt citing *Chapman, supra* and *Harrington v. California*, 395 U.S. 250 (1969).

Milton, supra, is significant because it moves away from the holding of *Chapman, supra*, that some constitutional errors are so egregious as to warrant automatic reversal no matter what the weight of other evidence. *Chapman, supra* entailed a two part test: First, the court looked to the nature of the constitutional error. Only if it were not of a particular class, *e.g.*, a coerced confession, would it continue to the second stage where the court weighed the other evidence against the accused.

Milton, supra must be seen as an abandonment of that two-part test in favor of a single test. Under *Milton, supra*, even where the alleged error is a coerced confession, the court should apply only the second part of the *Chapman* test: The measuring of the weight of the other evidence.

Here, seven eye-witnesses to the robbery and assault positively identified the respondent. The District Court, see Appendix D, found that the "in-court identifications did not violate due process and taint [respondent's] conviction". Note 19. No defense was offered at trial.

This case stands squarely for the proposition that the introduction of a confession at trial, even if alleged to be coerced, can be harmless error beyond a reasonable doubt. Dated. New York, New York, January 24, 1977.

CONCLUSION

Petitioner's application for certiorari should be granted and the decision of the Court of Appeals summarily reversed or plenary review granted.

Dated: New York, New York, January 24, 1977.

Respectfully submitted,

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State of New York
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Appendix A.

**UNITED STATES of America ex rel. Alfred LEWIS,
Petitioner-Appellant,**

v.

**Robert J. HENDERSON, Superintendent of Auburn
Correctional Facility, Respondent-Appellee.**

No. 819, Docket 74-2655.

**United States Court of Appeals,
Second Circuit.**

Argued April 1, 1975.

Decided June 4, 1975.

State prisoner filed a petition for a writ of habeas corpus wherein he alleged that he was imprisoned on basis of state bank robbery conviction which was unconstitutionally obtained. The United States District Court for the Northern District of New York, Edmund Port, J., entered an order which denied the petition, and petitioner appealed. The Court of Appeals, Mansfield, Circuit Judge, held that allegation that defendant was young, of limited education, arrested in questionable circumstances, questioned all night, denied sleep and food, deceived by false promises of help and completely deprived of the support of counsel or friends until he confessed, alleged factors which, if proved, would establish that defendant's confession was obtained under circumstances of mental coercion in violation of due process.

Affirmed in part, reversed in part and remanded.

Lawrence Stern, Brooklyn, N.Y., for petitioner-appellant.

David L. Birch, Deputy Asst. Atty. Gen. (Louis J. Lefkowitz, Atty. Gen., of the State of New York, Irving Galt,

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Asst. Atty. Gen., New York City, of counsel), for respondent-appellee.

Before ANDERSON, MANSFIELD and OAKES, Circuit Judges.

MANSFIELD, Circuit Judge:

Alfred Lewis, a state prisoner serving a term of 30 to 60 years for bank robbery,¹ appeals from an unreported decision and order of the United States District Court for the Northern District of New York, Edmund Port, Judge, denying his petition for a writ of habeas corpus. Lewis alleged, *inter alia*, that his conviction was obtained through the use of his physically and mentally coerced confession and that state determinations of the voluntariness of his confession were factually and procedurally deficient. The district court denied his petition without a hearing on the ground that the state had accorded him a full and fair post-trial hearing on voluntariness and that the state hearing judge's determination of voluntariness was adequately supported by the record and the law. While we agree that the state court determination adequately determined voluntariness so far as physical coercion is concerned and we affirm as to that issue, we reverse and remand as to the claim of mental and psychological coercion because that allegation has never been sufficiently developed and passed upon by either a state or federal court.

Just after noon, on February 6, 1958, a bank at 155th Street and Third Avenue, Bronx, New York, was robbed of \$12,000 by a lone gunman. Eleven days later, on Febru-

¹ At the time when this appeal was heard Lewis had been transferred to the West Street Detention Center, a federal prison in Manhattan, to await trial on federal bank robbery charges. The charges stemmed from his alleged robbery of a bank while he was out of prison for a short period of time in order to look for a job in anticipation of being paroled from state prison.

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ary 17, at approximately 8:30 P.M., petitioner, then a 22-year old black man with a 9th grade education was arrested in the lobby of an apartment building in Manhattan. According to police testimony given at the robbery trial and questioned by Lewis, he was arrested on the complaint of a Mrs. Elizabeth Waller, a resident of the apartment building. She had earlier related to the police that petitioner, on February 8 or 10, had left a briefcase containing a large sum of money in her apartment. When he returned for it on February 16 he told Mrs. Waller that \$1,700 was missing and that he would return for it, an apparent threat which prompted Mrs. Waller to go to the police.

Upon arrest Lewis was immediately taken to the 30th Precinct headquarters where he was kept overnight until about noon of the next day, February 18. He was not booked on any charges and was not arraigned before a Magistrate on that night or the next morning.

The events at the 30th Precinct are in dispute. Petitioner testified on voir dire at his trial that from the time he arrived at the police station until the next morning he was subjected to interrogation and beatings by police officers, was not given any food and was denied the opportunity to sleep. The interrogation, he testified, related to the Bronx bank robbery, not Mrs. Waller's complaint, and petitioner was urged to confess and disclose the location of the robbery proceeds. The testimony of police officers present at the 30th Precinct during most of Lewis' stay there flatly contradicted his allegations of beatings. Other aspects of Lewis' story are corroborated or uncontradicted, however. The police witnesses agreed that Lewis was interrogated intermittently at the 30th Precinct throughout the night about the Bronx robbery. None of them knew whether petitioner had been given any food or allowed to sleep in the short intervals between interrogation sessions. Finally, a lineup and various showups were apparently

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held during the night and the next morning, with several witnesses to the robbery identifying petitioner as the perpetrator.

At about noon on February 18 petitioner was taken by several detectives to the 42d Precinct headquarters in the Bronx, near the scene of the robbery. He claims that he was again subjected to interrogation and beatings and had still neither been given food nor allowed to sleep. Again the police denied the allegations of beatings, agreed that the interrogations took place, but did not know whether petitioner had been allowed to eat or sleep. During this period the police tried to convince Lewis to cooperate by promising to drop criminal charges pending in another jurisdiction and to accept his claim that the money in the briefcase was gambling winnings, if he would agree to lead them to the money.

Lewis finally gave in at about 2:00 P.M. on February 18 and, in the company of a friend, led the police to the money. Shortly after his return to the 42d Precinct, at about 3:30 P.M., he confessed after further promises of help from the police in the disposition of his case. The confession was repeated in the presence of more detectives and given a third time to an Assistant District Attorney and a stenographer.

On the night of February 18 Lewis was held at the 42d Precinct in a detention cage. He tried to sleep on the floor and had only some candy bars to eat, which a uniformed officer had brought at his request. The next morning he had a bowl of soup and was finally arraigned at 10:00 A.M. on February 19 on bank robbery charges. There was no police testimony to contradict his description of this aspect of his confinement.

It is uncontested that not once during his 38 hours of detention by the police was Lewis ever advised of his right to remain silent or of his right to counsel. In addition, he

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was at no time allowed to see or speak to anyone but the police, except during the expedition to retrieve the money.

Petitioner's trial began on October 6, 1958. Copies of his confession were introduced into evidence in the face of his objection that it was both false and the product of illegal coercion. Pursuant to the procedure in use in New York at that time both of these issues were left for the jury to resolve on the basis of the evidence and the law. Lewis, along with several police officers, testified on voir dire to their respective versions of the facts as related above. He was found guilty of the robbery and sentenced to 30-60 years imprisonment. The Appellate Division affirmed without opinion, *People v. Lewis*, 10 A.D.2d 924, 202 N.Y.S.2d 1001 (1st Dept. 1960), and leave to appeal to the Court of Appeals was denied.

Pursuant to a pro se coram nobis petition filed by Lewis in the state court, a *Huntley* hearing² was held in January 1970 by Justice Edward T. McCaffrey, who had presided at the original trial, to determine whether the confession was the result of illegal coercion. At the outset of the hearing Lewis, speaking for himself, asked the court to consider and determine "whether defendant's constitutional rights were violated when the Court at Page 667 of the trial record³ refused defendant's request to charge the jury,

² Held pursuant to *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), New York State's procedural response to *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

³ The trial record reveals the following request of Lewis' trial counsel and the trial judge's ruling:

"Mr. Kunstler: And secondly, your Honor, that the jury may take into consideration in determining whether the confession was coerced or not the mental condition of the defendant and the length of time he was held by the police prior to his arraignment.

(footnote continued on following page)

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that it must disregard the confession if it found it to have resulted from mental or psychological pressure and expressly limit [sic] the jury to consideration of physical pressure deciding whether it should accept, or disregard the confession, as per the original coram nobis petition verified August 11, 1969, and the defendant's traverse, connected therewith verified September 8th, 1969, since in view of what has just been said, the jury has not properly passed upon the question of voluntariness as indicated, in *People versus Huntley*, 15 N.Y. 2nd Series, at Page 78." (Hearing Minutes 21-22). This request was thereupon denied by Justice McCaffrey. The evidence consisted of the transcript of the original trial testimony concerning the circumstances surrounding the confession, augmented by testimony of two new witnesses corroborating petitioner's claim of beatings and by further police testimony contradicting the beatings claim. The hearing record reveals that this evidence was introduced in an effort, notwithstanding Justice McCaffrey's earlier denial of Lewis' motion attacking the confession on grounds of mental coercion, to prove such coercion. Counsel for Lewis argued to the court that the circumstances surrounding the obtaining of the confession were "inherently coercive" (Hearing Minutes 89) and the district attorney responded "[s]o certainly, we can't say that any interrogation that took place the night before so affected his mind, that he could not . . . that his subsequent confession was involuntary." (*Id.* at 92). In an opinion dated March 24, 1970, which summarized in narrative form the evidence received by him,

(footnote continued from preceding page)

"The Court: The Court will charge that in deciding whether the defendant was coerced into confessing, the jury may take into consideration the length of time in which he was held by the police prior to arraignment and any physical pressure applied to him. You have an exception as to my omitting the mental or psychological." (Trial Minutes 667).

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Justice McCaffrey concluded that the confession was "voluntarily made" and "not the result of physical coercion of any kind." The decision was affirmed on appeal without opinion, *People v. Lewis*, 35 A.D.2d 1086, 316 N.Y.S.2d 191 (1st Dept. 1970), and leave to appeal to the Court of Appeals was denied.⁴

Lewis filed a pro se habeas corpus petition in the Western District of New York, received on May 6, 1970, again attacking the voluntariness of his confession on grounds of physical and mental coercion. This was denied by Judge Curtin on June 28, 1971, on the ground that the *Huntley* hearing had adequately and fairly determined the issues as to voluntariness. A certificate of probable cause for an appeal was denied by both Judge Curtin and this Court and certiorari was denied by the Supreme Court.

Undaunted, petitioner filed this habeas corpus petition pro se in the Northern District of New York, received on July 17, 1974, raising, *inter alia*, the voluntariness issue again along with the adequacy of the state court proceedings. Judge Port denied the petition essentially on the basis of the earlier decisions of Judge Curtin and Justice McCaffrey. We granted a certificate of probable cause permitting the instant appeal and permitted assignment of counsel.

DISCUSSION

Putting aside the claim of physical abuse for the moment, the first question to be resolved on this appeal is whether the facts alleged by Lewis, if proven, would make

⁴ In view of these extensive state proceedings which presented all of the issues raised on this appeal to the highest New York State court, the state could not, and does not, contend that petitioner Lewis has failed to exhaust his state remedies. See, e.g., *United States ex rel. Ross v. LaVallee*, 448 F.2d 552 (2d Cir. 1971).

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out a case of unconstitutional mental coercion. Over the years the Supreme Court has created various formulations of the standard governing the admissibility of confessions under the Due Process Clause of the Fourteenth Amendment. Generally, if a defendant's "will was overborne," *Reck v. Pate*, 367 U.S. 433, 440, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961), or if the confession was not "the product of a rational intellect and a free will," *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960), it must be excluded from the evidence at trial on the ground that it was impermissibly coerced. Such general standards have been of but limited utility, however, when one is called upon in a particular case to decide whether, in "[t]he totality of the circumstances that preceded the [confession]," *Fikes v. Alabama*, 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957), a particular suspect was forced to confess against his will.

[1] Fortunately there are now a significant number of Supreme Court decisions which go beyond general expressions of standards and explicate particular factors or groups of factors which, when included in the totality of circumstances, require that a resulting confession be invalidated on grounds of coercion. Applying these standards, petitioner alleges facts which would, if established, mandate a finding that his confession was obtained in violation of his Due Process rights. For present purposes the significant allegations made by him are the following:

(1) He was never once, during the whole period of pre-arraignment interrogation, advised of his right to remain silent or of his right to counsel. Although this is a pre-*Miranda* case, this failure on the part of police in a particular case has long been recognized as significant in the calculus of coercion. *Davis v. North Carolina*, 384 U.S. 737, 740-41, 86 S.Ct. 1344, 16 L.Ed.2d 360 (1966);

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Culombe v. Connecticut, 367 U.S. 568, 609-10, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

(2) According to Lewis he was arrested on the pretense of Mrs. Waller's alleged complaint, held for approximately 38 hours by the police during which time he was neither booked nor arraigned, and questioned during most of the first half of this period. Extremely long periods of confinement coupled with successive periods of questioning, such as occurred here, usually tend to pressure a defendant into saying what the police want in order to stop the steady pressure. *Clewis v. Texas*, 386 U.S. 707, 711-12, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967).

(3) During his extended period of detention before and after confession, Lewis was not allowed to make any telephone calls, was not allowed to see anyone and, with one minor exception, saw and spoke to no one but the police. This sort of isolation denies a defendant psychological support from friends, relatives and counsel, putting him at an extreme disadvantage when confronting the police. *Haynes v. Washington*, 373 U.S. 503, 511, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Haley v. Ohio*, 332 U.S. 596, 599-601, 68 S.Ct. 302, 92 L.Ed. 224 (1948).

(4) Lewis was continuously interrogated throughout the night of February 17 and on into February 18 on an intermittent basis without being given any real opportunity to sleep or any substantial food. The debilitating effect of such treatment on a defendant's will and mind has long been recognized by the Supreme Court. *Payne v. Arkansas*, 356 U.S. 560, 567, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); see *Clewis v. Texas*, *supra*, 386 U.S. at 712, 87 S.Ct. 1338.

(5) Lewis, at the time of his confession, was a young 22-year old black man of limited education with apparently little prior experience with police methods, thus render-

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ing him particularly susceptible to police pressure. *Haley v. Ohio, supra*, 332 U.S. at 599-601, 68 S.Ct. 302; see *Davis v. North Carolina, supra*, 384 U.S. at 742, 86 S.Ct. 1344.

(6) The police detectives made various promises to petitioner, including an offer to "help" him with his case if he confessed and a pledge that his claim of ownership would not be challenged if he would only retrieve the money. Furthermore, his agreement to retrieve the money and his confession followed soon after these false promises, underscoring their effect upon his will. *Lynnum v. Illinois*, 372 U.S. 528, 531-35, 83 S.Ct. 817, 9 L.Ed.2d 922 (1963); *United States ex rel. Everett v. Murphy*, 329 F.2d 68 (2d Cir.), *cert. denied*, 377 U.S. 967, 84 S.Ct. 1648, 12 L.Ed.2d 737 (1964); see *Bram v. United States*, 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

[2] Of particular relevance here are the Supreme Court's decisions in *Haynes v. Washington, supra*, and *Haley v. Ohio, supra*. The defendant in *Haynes* was held incommunicado for 16 hours while the police questioned him until he confessed. He was not advised of any of his rights and the circumstances of his confinement implied that he would be allowed to see no one until he confessed. In *Haley* the defendant was a young boy who was arrested at midnight and questioned all night without benefit of counsel or of a friend to advise him. He finally confessed five hours later when confronted with the alleged confessions of his alleged accomplices. Although not all of the factors of *Haynes* or *Haley* (or of any other case for that matter) are present here, the same type of techniques designed to overbear the defendant's will were allegedly used. Defendant is described as young, of limited education, arrested in questionable circumstances, questioned all night, denied sleep and food, deceived by false promises of help and completely de-

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prived of the support of counsel or friends until he confessed. Here, as in many similar cases, e. g., *United States ex rel. Weinstein v. Fay*, 333 F.2d 815 (2d Cir. 1964); *United States ex rel. Williams v. Fay*, 323 F.2d 65 (2d Cir. 1963), *cert. denied*, 381 U.S. 945, 85 S.Ct. 1788, 14 L.Ed.2d 709 (1965); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896, 76 S.Ct. 155, 100 L.Ed. 788 (1955), we cannot avoid the conclusion that these facts, if proved, would establish that Lewis' confession was obtained in circumstances which overcame his will. Its use against him at his trial would therefore violate his Due Process rights. *Reck v. Pate, supra*.

[3] Since we find that Lewis has alleged mental coercion amounting to a deprivation of Due Process we must determine whether, under *Townsend v. Sain*, 372 U.S. 293, 310-19, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and 28 U.S.C. § 2254(d),⁵ the district court was required to hold a hearing on his factual contentions, see *Procunier v. Atchley*, 400 U.S. 446, 451-52, 91 S.Ct. 485, 27 L.Ed.2d 524 (1971). Such a hearing is, of course, required if the state evidentiary hearing failed to resolve the merits of the factual dispute or was not "full and fair." *Townsend v. Sain, supra*, 372 U.S. at 313, 83 S.Ct. 745.

[4] There is no question here that a state evidentiary hearing was held on the issue of voluntariness and that the decision was adverse to petitioner. We must still decide, however, whether that hearing resolved the merits of the claim of mental coercion and was "full and fair." It is petitioner's contention that the state *Huntley* hear-

⁵ 28 U.S.C. § 2254(d) is treated in this Circuit as, in essence, a codification of the hearing criteria of *Townsend v. Sain, supra*. *United States ex rel. Hughes v. McMann*, 405 F.2d 773, 776 (2d Cir. 1968).

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ing was fatally deficient because of the court's failure to pass upon his claims of mental and psychological coercion.

The *Huntley* hearing judge concluded in his opinion that Lewis' confession was "voluntarily made" and "not the result of *physical* coercion of any kind." (Emphasis supplied) There was no conclusion specifically addressed to mental coercion. The opinion itself contains no explicit findings of fact. It simply recounts the relevant testimony, emphasizing portions dealing with physical abuse, based on the transcript of the original trial and the testimony of live witnesses at the hearing. The only hint of the judge's view of the facts is his observation concerning the credibility of Lewis and the two witnesses called by him and discrepancies in the tales recounted by each. The opinion makes no attempt to resolve these discrepancies, however.

Clearly, the hearing judge did not believe Lewis' allegations of physical abuse. This is the only conclusion that can be drawn from his statement that no physical coercion was used. On the other hand, the opinion is silent as to mental coercion. The bald statement that the confession was "voluntarily made" might, standing alone, mean that the allegations concerning mental coercion were not believed. However, when considered in the context of the earlier trial and of the later *Huntley* hearing it is clear that Justice McCaffrey did not believe that the allegations of mental coercion made out a constitutional violation and that he accordingly was not giving them consideration. At Lewis' original trial he had erroneously refused to instruct the jury that Lewis' "mental condition" should be considered by it in determining the voluntariness of the confession.⁶ Instead he charged that the

⁶ Lewis also attacked, without success, this apparently erroneous jury instruction in state collateral proceedings and in the pro se habeas corpus petition filed in this case. On this appeal the issue is not raised and need not be considered in light of our disposition of the case.

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length of time in police custody before arraignment and physical abuse were the relevant factors to be considered by the jury, granting "an exception as to my omitting the mental or psychological." There is no indication in his *Huntley* opinion that either his view of the law had changed or that mental coercion was actually considered. On the contrary, at the outset of the *Huntley* hearing he denied Lewis' motion to expand the hearing to reconsider his earlier ruling that the jury should not be instructed that it "must disregard the confession if it found it to have resulted from mental or psychological pressure," thus reaffirming his view limiting "the jury to a consideration of physical pressure." This view is confirmed by his emphasis in his *Huntley* hearing opinion upon evidence with respect to physical abuse in the recited testimony, which makes up the bulk of the opinion, to the exclusion of evidence indicating mental coercion. Viewing the record as a whole we conclude that the state judge found the confession to be voluntary because he disbelieved the allegations of physical abuse while ignoring the allegations going to mental coercion. The finding of voluntariness thus cannot be said to have resolved any of the factual disputes noted above as to mental coercion or even reached a decision on that issue. *Cunningham v. Heinze*, 352 F.2d 1, 3-4 (9th Cir. 1965), cert. denied, 383 U.S. 968, 86 S.Ct. 1274, 16 L.Ed.2d 309 (1966); *United States ex rel. Kenney v. Fay*, 232 F.Supp. 899 (S.D.N.Y. 1964).⁷

⁷ This case may be favorably contrasted to *LaVallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973) (*per curiam*), in which the Supreme Court reversed a decision of this court upholding a hearing on a habeas corpus petition because of an inability to determine whether the state court, after a *Huntley* hearing, had found the confession voluntary because of an erroneous view of the law or because of a resolution of factual issues against the petitioner. The Court concluded that under

(footnote continued on following page)

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This case then falls into the first category of cases in which an evidentiary hearing must be held by the district court under *Townsend v. Sain*, *supra*, 372 U.S. at 313-16, 83 S.Ct. 745, and 28 U.S.C. § 2254(d). That is, the merits of the factual dispute surrounding the existence of mental coercion were not resolved in the state hearing. No specific factual findings were made and the federal court cannot reconstruct the state findings, if any, because there is a strong indication that a portion of the applicable constitutional doctrine was misapplied or ignored. *Id.*

[5, 6] Turning to the allegations of physical abuse, the situation is wholly different. The *Huntley* judge certainly considered this issue both at the original trial and at the later hearing. His opinion recounted all of the testimony on the issue of physical abuse and specifically concluded that the confession did not result from such treatment. We cannot assume from the *Huntley* hearing opinion and the record on this appeal that the *Huntley* judge applied

(footnote continued from preceding page)

all of the circumstances the federal courts could be reasonably certain that the correct standard had been applied and that no federal hearing was necessary or proper. Although the state court had made no specific findings of fact, there was no evidence that the wrong standard had been utilized and the determination was made on the "totality of the circumstances" with the proper factors apparently considered.

Here, by way of contrast, the state judge did not indicate in any way in his *Huntley* opinion that his earlier erroneous view of the law had changed since 1958. He recounted all of the testimony before him with emphasis on the allegations and denials of physical abuse but with no reference to mental coercion. He discussed the credibility of petitioner's witnesses, but their testimony only related to the allegations of physical beatings. Finally, he expressly concluded only that the confession was not the result of "physical" coercion. In contrast to *Delle Rose*, there is no indication here that the correct law was applied. However, there is significant evidence that an important doctrine of law was simply ignored.

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the incorrect constitutional standards to this issue, see *LaVallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973) (*per curiam*). Nor can we say, after an examination of the record, including the *Huntley* hearing transcripts, that the state factual determination is not fairly supported by the record as a whole or that there are any other defects in the state court proceedings.

[7] Although not an issue specifically raised by the state, we are satisfied that the denial of Lewis' previous application for habeas corpus relief in the federal courts cannot bar consideration of the instant petition. The previous denial could only constitute a bar if: (1) the grounds for relief in the present application were determined adversely to Lewis in the prior application, (2) the prior determination was on the merits and (3) the ends of justice would not be served by reaching the merits of this application. *Sanders v. United States*, 373 U.S. 1, 15, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). There is no question that the claims presented in the present application were also presented in the prior one. However, as we have shown, Lewis' allegations concerning mental or psychological coercion raise issues of fact that were not resolved and probably not even considered by the state court. The prior adjudication of the district court on Lewis' first pro se petition^{*} appears to have ignored these issues also. The district court did not mention them and Judge Curtin simply concluded that the confession was "not the result

^{*} It has been suggested that if the prior application was denied without appointment of counsel any subsequent application must be considered on its own merits and not summarily denied on the basis of the previous denial. *Tucker v. United States*, 138 U.S. App.D.C. 345, 427 F.2d 615, 617-18 n.13 (1970). We do not explicitly rest our decision on that ground, although lack of counsel may explain why the district court was apparently unaware of the mental coercion claim in the prior application.

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of physical coercion of any kind." In these circumstances a decision without a hearing, much less any mention of the mental coercion issue, is not on the merits and cannot bar consideration of the instant petition. *Id.* at 16, 83 S.Ct. 1068; see *Saville v. United States*, 451 F.2d 649, 650 (1st Cir. 1971).

[8] Since a state court conviction tainted by an involuntary confession cannot stand under the Due Process Clause, *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *Payne v. Arkansas*, *supra*, 356 U.S. at 567-68, 78 S.Ct. 844, the decision below is reversed as to the issue of mental and psychological coercion and the case is remanded to the district court for a hearing to resolve the factual disputes surrounding that issue.

Appendix B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

74-CV-

U. S. ex rel. ALFRED LEWIS,
Petitioner,
vs.

ROBERT J. HENDERSON, Superintendent of Auburn
Correctional Facility,
Respondent.

EDMUND PORT, Judge

Memorandum—Decision and Order

The Clerk of the court has sent to me for my consideration a petition for a writ of habeas corpus together with an affidavit in forma pauperis from an inmate now confined in the Clinton Correctional Facility, Dannemora, New York. The inmate was confined in the Auburn Correctional Facility when he sent the petition to the Clerk of the court. The petition is accompanied by a 27 page brief prepared by the Cornell Legal Assistance Project for the Auburn Correctional Facility.

The petitioner was convicted in the Bronx County Court, after a jury trial in 1958, of the crimes of Robbery 1st degree, Grand Larceny 1st degree, and Assault 2nd degree, and sentenced to three consecutive terms totaling 30-60 years imprisonment. The conviction was affirmed on direct appeal,¹ and the Court of Appeals denied leave to appeal

¹ *People v. Lewis*, 10 A.D.2d 924 (1st Dept. 1960).

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on July 15, 1960. A post-trial "Huntley" hearing was held in the Bronx County Supreme Court, and found certain of petitioner's confessions to have been voluntary by a decision dated March 24, 1970. The Appellate Division affirmed this determination,² and the Court of Appeals denied leave to appeal.

The petitioner has had quite a number of collateral proceedings in both the state and federal courts over the years since his conviction, including the denial of a federal petition for habeas corpus by Judge John T. Curtin of the Western District of New York in 1971 by two separate opinions: (A) one dated June 28, 1971 finding, inter alia, certain of petitioner's confessions to have been voluntarily made, and (B) another dated August 3, 1971 which dismissed as without merit petitioner's claim that the trial judge improperly charged the jury concerning voluntariness. Although Judge Curtin's decisions³ were made without a hearing, they were based upon the full trial transcript, appellate briefs, a coram nobis transcript, the Huntley hearing transcript and the state court judge's decision thereon. Judge Curtin denied a certificate of probable cause, as did the Second Circuit. The Supreme Court denied certiorari on December 4, 1972.

Although the petition herein is extensive and rambling, the claims made herein are essentially as follows: (1) that the Huntley hearing court failed to secure the attendance of certain witnesses at the Huntley hearing and the assistant district attorney at the Huntley hearing "probably lied"⁴ when he stated that a certain witness' address was unknown and that he did not know whether that witness

² *People v. Lewis*, 35 A.D.2d 1086 (1st Dept. 1970).

³ *United States ex rel. Alfred Lewis v. Mancusi*, Civil No. 1970-322 (W.D.N.Y. 1971).

⁴ *Petition*, p. 19.

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(one Walsh) was alive or dead; (2) that the trial court failed to properly charge the jury concerning voluntariness; (3) that petitioner's confessions were involuntary. Each of these contentions will be separately considered.

CONTENTION (1):

This contention is explained at pages 18-20 of the petition and relevant portions thereof are set forth below:

The defendant also moved on January 7, 1970 that a means be provided to secure the presence to testify at the (Huntley) hearing of police and F.B.I. personnel who the trial record shows were present at the interrogation and/or confession of the defendant which were the subjects of the hearing . . . , including Deputy Inspector Walsh who defendant accused at the trial of participating directly in the beating of the defendant . . . and who the trial record establishes actually took a challenged confession from the defendant which went to the jury. The defendant was told by the Court to discuss the matter of the witnesses with counsel who would endeavor to locate them. . . .

In the case of Deputy Inspector Walsh, the court inquired of the assistant district attorney handling the case for the People if he intended to call Walsh as a witness. . . . The assistant district attorney, admitting that Walsh was present at the defendant's confession . . . answered . . . that Walsh was retired, perhaps dead and his address and whereabouts unknown, which statement led the court to make no effort to secure Walsh's attendance to testify at the hearing. . . .

* * *

The defendant's attorney, although indirectly instructed by the Court on Jan. 7, 1970 to make this endeavor . . . as already indicated at page 18 hereof,

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refused to try to locate Walsh or the other witnesses and took the recorded position (Huntley Minutes 24-27) that they would be hard to locate and that since they were not called to testify at the original trial they might not have anything significant to say.

Petitioner does not allege that he ever attempted to actually subpoena the unnamed witnesses or Walsh. Further, their materiality to the Huntley hearing is open to question as they were not called as witnesses upon the original trial and did not testify. In connection with the witness Walsh, the petitioner's sole basis for concluding that the assistant district attorney "probably lied" is that he (the petitioner) claims that he was able to determine at a later date that Walsh was still alive and living in the New York City area. Finally, it appears that the witnesses were not called or located for the purposes of the Huntley hearing because petitioner's counsel apparently did not deem them of sufficient importance to the proceeding; the competency of petitioner's counsel is not before this court in this proceeding.

In my opinion, under the facts disclosed in the petition, the first contention is without federal or constitutional merit and will be denied and dismissed.

CONTENTION (2):

Petitioner's second contention has previously been passed upon by Judge Curtin and found to be without merit. *United States ex rel. Alfred Lewis v. Mancusi*, supra, decision of August 3, 1971. I am satisfied that the ends of justice do not require this court to reexamine that determination, and this contention is also denied and dismissed. 28 U.S.C. § 2244(a).

CONTENTION (3):

Initially, petitioner asserts that the "Huntley" court considered only one of his confessions and failed to determine

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the voluntariness of two additional confessions made after the initial confession. This may be so, but it was petitioner's attorney who requested the "Huntley" court to so limit its examination. See *Petition*, at p. 17 fn. 6, and p. 21; and p. 1 of Judge McCaffrey's decision on the Huntley hearing, annexed to the petition. In addition, petitioner also states that he agreed with this strategy at the time. See *Petition*, p. 21. Accordingly, I am of the opinion that no constitutional violation has been shown.

Petitioner also claims that the "Huntley" hearing judge, Hon. Edward T. McCaffrey, erred in the standard he utilized to determine voluntariness. Petitioner quotes from the "Huntley" decision as follows:

This court is satisfied beyond a reasonable doubt that the statements made by defendant to Detective Beckles and to Detective Corbett, respectively, on the 18th of February 1958 at the 42nd Precinct were voluntarily made and were not the result of physical coercion of any kind.

Petitioner claims that the quoted portion of Judge McCaffrey's decision indicates that he failed to consider the effect of mental or psychological coercion upon the voluntariness of his confessions.

An examination of Judge McCaffrey's decision on the "Huntley" hearing reveals its thoroughness and his full familiarity with the testimony upon petitioner's trial⁵ as well as petitioner's contentions. After the "Huntley" hearing, Judge McCaffrey found petitioner's statements to be voluntary *and* not the result of physical coercion of any kind. Judge Curtin, after his own review of the full file in petitioner's case, found no reason to upset Judge Mc-

⁵ Judge McCaffrey was the trial judge upon petitioner's trial; the "Huntley" hearing consisted largely, by petitioner's and the People's consent, of the submission of the trial transcript.

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Caffrey's determination on the "Huntley" hearing and likewise dismissed petitioner's contentions in connection with the voluntariness of his confessions.

Simply from the phraseology utilized by Judge McCaffrey on his "Huntley" hearing determination, quoted on the top of this page, and Judge Curtin's reliance upon the same in his decision,⁶ I will not presume that both judges were unaware of and applied the wrong standards to test the voluntariness of petitioner's confessions. See 28 U.S.C. § 2254(d); *La Vallee v. Delle Rose*, 410 U.S. 690 (1973); and *Townsend v. Sain*, 372 U.S. 293, 314-315 (1963). This is particularly true in view of the fact that, to this court at least, petitioner relied most heavily upon the alleged physical coercion to upset the voluntariness of his confession, vis a vis the claimed mental or psychological coercion.

Accordingly, contention (3) will be also denied and dismissed.

For the reasons herein, it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted, and the Clerk is directed to file the papers herein without the payment of the prescribed fees.

EDMUND PORT
United States District Judge

Dated: August 20, 1974
Auburn, New York.

⁶ Petitioner also contends that Judge Curtin applied the incorrect standard.

Appendix B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

74-CV-

UNITED STATES ex rel. ALFRED LEWIS,
Petitioner,
v.

ROBERT J. HENDERSON, Superintendent of
Auburn Correctional Facility,
Respondent.

EDMUND PORT, Judge

ORDER

By Memorandum-Decision and Order dated August 20, 1974, I dismissed the above captioned petition for federal habeas corpus relief.

I have received on August 21, 1974, additional papers from the petitioner, sworn to on August 19, 1974, entitled "Amendment of Petition for Habeas Corpus." These papers contain nothing, in my opinion, to change this court's determination of August 20, 1974. Treating the papers as a motion for reconsideration, the same is granted, and upon reconsideration, the original decision is reaffirmed and adhered to. The Clerk is directed to file the papers herein with the other papers in this action.

It is So Ordered.

EDMUND PORT
United States District Court Judge

Dated: August 27, 1974.
Auburn, New York.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of November, one thousand nine hundred and seventy-six.

Present:

HONORABLE WILFRED FEINBERG

HONORABLE WALTER R. MANSFIELD

HONORABLE THOMAS J. MESKILL
Circuit Judges,

No. 76-2093

ALFRED LEWIS,

Petitioner-Appellee,

—against—

ROBERT J. HENDERSON,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix C.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Frankel, dated July 16, 1976.

WILFRED FEINBERG

WALTER R. MANSFIELD

THOMAS J. MESKILL
U.S.C.JJ.

Appendix D.

UNITED STATES of America ex rel.
Alfred LEWIS, Petitioner,

v.

Robert J. HENDERSON, Superintendent,
Auburn Correctional Facility,
Respondent.

No. 76 Civ. 399.

United States District Court, S. D. New York.

July 16, 1976.

State prisoner filed habeas corpus proceeding on basis that mental and psychological coercion had caused him to confess. The District Court, Frankel, J., held that bank robbery suspect's confessions were obtained in violation of his due process rights and that it could not be said beyond reasonable doubt that confessions did not contribute to his conviction.

Petition granted.

Lawrence Stern, Brooklyn, for petitioner.

Louis J. Lefkowitz, Atty. Gen., State of N. Y., New York City, for respondent; Joel Lewittes, David L. Birch, New York City, of counsel.

OPINION

FRANKEL, District Judge.

Alfred Lewis was convicted of bank robbery, grand larceny, and assault, after a jury trial in the New York State courts in 1958.¹ He was sentenced to a term of 30

¹ All the charges related to the robbery of a branch of the Manufacturers Trust Company at 155th Street and Third Avenue in the Bronx at approximately noon on February 6, 1958.

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to 60 years. Since then, he has persistently sought to have his conviction vacated on the ground, *inter alia*, that confessions² introduced at his trial were the product of physical and mental coercion. These efforts started when, pursuant to a *pro se* coram nobis petition, a *Huntley* hearing was held in January 1970 by Justice Edward T. McCaffrey, who had presided at the original trial, to determine whether the confessions were the product of unconstitutional coercion. In an opinion dated March 24, 1970, Justice McCaffrey denied the application, finding that the confessions "were voluntarily made and were not the result of physical coercion of any kind." The decision was affirmed without opinion, 35 A.D.2d 1086, 316 N.Y.S.2d 191 (1st Dep't 1970), and leave to appeal to the Court of Appeals was denied. A *pro se* habeas corpus petition was then filed in the Western District of New York, again attacking the voluntariness of the confessions. Judge Curtin, in an unpublished memorandum opinion, denied the petition by order dated June 28, 1971, on the ground that the *Huntley* hearing had adequately determined the issue. Both Judge Curtin and the Court of Appeals denied a certificate of probable cause, and the Supreme Court denied certiorari.

² There were actually three verbal confessions. The first was made to a Detective Corbett. Petitioner then repeated the same admissions before a number of other detectives, with Corbett by his side. Petitioner recounted his confession a third time before the District Attorney and a stenographer. All of these confessions were to the same effect and given within the space of an hour and a half on the same day. Copies of the recorded confession were introduced at petitioner's trial. Detectives Beckles and Corbett testified concerning the two unrecorded confessions. Petitioner also asserts that evidence of his leading the police to marked money from the bank and the money itself constitute a fourth "confession." Although this characterization was apparently rejected by the state judge presiding over the *Huntley* hearing, it would seem that the same constitutional claims apply to this evidence as well.

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Still moving *pro se* (although assisted by a brief of the Cornell Legal Assistance Project), petitioner filed the instant petition in the Northern District of New York on July 17, 1974, raising the voluntariness issue along with the adequacy of the state court proceeding. The petition was denied by Judge Port. This time, however, the Court of Appeals granted a certificate of probable cause, assigned counsel, reversed "as to the issue of mental and psychological coercion", and remanded for a hearing to resolve the factual disputes on that issue. *United States ex rel. Lewis v. Henderson*, 520 F.2d 896 (2d Cir.), cert. denied, 423 U.S. 998, 96 S.Ct. 429, 46 L.Ed. 373 (1975).³

Judge Port continued the assignment of counsel and transferred the case to this district for a hearing, which was held on April 5, 1976. Having reviewed the evidence, which is summarized below, and the legal arguments of the parties, the court concludes that the writ must issue.⁴

³ The question whether petitioner was beaten, as he continues to swear, appears to have been resolved finally against him by the decision of the Court of Appeals. The Circuit upheld Judge McCaffrey's finding that petitioner's confession was not the result of physical coercion of any kind. 520 F. 2d at 904. However, since Judge McCaffrey made no findings of fact, it is not perfectly clear whether he found that (a) there had been no physical abuse whatever or (b) whatever abuse there was, if any, did not cause petitioner to confess. It is at least arguable, then, that it might be open to this court to determine whether there were any beatings and, if so, whether they contributed to petitioner's allegedly coerced confessions. In the end, however, the court has concluded that the issues of physical abuse and physical coercion are foreclosed by the Circuit's decision and has assumed that petitioner was not beaten and that his confession was not physically coerced. While this bifurcation may effect a small note of unreality, the task of deciding only what the court was directed to decide has proved wholly manageable.

⁴ Before Judge Port, petitioner also raised the argument that the trial court had failed to properly charge the jury concerning voluntariness. The petition was denied on this ground:

(footnote continued on following page)

Appendix D.

I.

The evidence adduced at this court's hearing included the testimony of petitioner and of Dr. Lawrence Lichtenstein, a psychologist, in support of the petition. Respondent presented Vincent Beckles and William Corbett, two of the detectives who questioned petitioner prior to his confessions. Exhibits included the transcript of the *Huntley* hearing, where Beckles and Corbett, but not petitioner, also testified, and the transcript of the trial, which included testimony of petitioner,⁵ Beckles and Corbett.

Petitioner's Testimony

At the hearing before this court, petitioner testified as follows:

He was picked up by the police at approximately 8:30 p.m. on February 17, 1958, and taken to the 30th Precinct, where he was questioned about some money the police claimed to have heard he possessed. When asked where he got the money, he said that he had won it gambling. The

(footnote continued from preceding page)

"Petitioner's second contention has previously been passed upon by Judge Curtin and found to be without merit. *United States ex rel. Alfred Lewis v. Mancusi*, *supra*, decision of August 3, 1971. I am satisfied that the ends of justice do not require this court to reexamine that determination, and this contention is also denied and dismissed. 28 U.S.C. § 2244(a)."

Memorandum Decision and Order of Judge Port, 74 Civ. 366, at 4 (N.D.N.Y. August 20, 1974). The issue was not raised on appeal, see 520 F.2d at 903, and is not now before this court on remand, despite some belated attempts by petitioner to raise it in his post-hearing briefs. In any case, the contention having been twice denied on federal habeas applications, there is no persuasive reason to consider it again.

⁵ Petitioner's trial testimony was limited to the issue of the voluntariness of his confessions.

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questioning started at a desk in a large room. After a few minutes there, petitioner was taken to a room containing "nine or ten beds," where he was seated in a chair. Initially, an Inspector Walsh asked most of the questions. Shortly after the interrogations began, a Detective Corbett came and actively participated in the questioning. Petitioner refused to tell where the money was, so he was beaten, primarily by Corbett and Walsh, but also by several others, as there were always six to eight, or more, people in the interrogation room. Later in his testimony, petitioner also recalled that Inspector Walsh

"asked me if I wanted to call somebody, wanted to make a telephone call, and I didn't have this in mind, although when he said it I immediately thought of calling my family and I said yes. And he said, 'Well, if you cooperate, you can make a telephone call, you just tell us what we want to know and tell us where the money is and we'll let you call.' And I said—when I said I couldn't do that, he said, 'Well, you can't make a telephone call.'"

Later that night, petitioner was taken to his apartment, where some of his clothing and personal property were gathered. He was then returned to the 30th Precinct, where the police "held an identification session where I was told to put on various articles of clothing and put on this hat and that hat, and so forth and stand before a peephole for identification purposes." There were several detectives in the "identification room," but apparently only petitioner was placed before the peephole for identification. Petitioner was then taken back to the room with the beds in it, where he was left for a few hours, although there "was always someone in the room with me."

The questioning resumed about 2 or 3 o'clock in the morning, at which time petitioner was told that he had been

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positively identified as the robber, and that he should admit the robbery, cooperate, and produce the money. No one ever told him that he had been arrested for the robbery, that he had a right to a lawyer and a right to remain silent, or that what he said could be used against him in a court of law. Petitioner continued to be beaten and questioned throughout the night. He had no food and was permitted no sleep. He saw detectives with coffee and sandwiches, "but I never was offered any food." The interrogations at the 30th Precinct continued into the morning of February 18th.

About noon or 1:00 p.m. on the 18th, petitioner was taken to the 42d Precinct. Lewis said that he was "tired, . . . weak, . . . exhausted, . . . almost beaten . . ." at the time of the transfer. At some point, either shortly before or after being moved, he was told that he was being charged with an assault. When he got to the 42d Precinct, with Detective Corbett "running the show," petitioner was again questioned by several detectives concerning the location of the money.

One of the detectives—not Corbett—told petitioner that the assault charge would be dropped if he "cooperated, confessed and primarily produced the money." When he refused, Corbett and the others started beating him again, and told him he would stay there until they got the money. After the beatings had continued for about half an hour, petitioner "couldn't . . . keep taking that kind of stuff" and told Corbett that the money was on a roof at an unspecified location. Petitioner did not, at this

* Petitioner made these remarks regarding the alleged promise:

"You know, it is hard to say whether anything like that is going to have an effect, but I'm just saying this: when they got a little tougher . . . it is possible that I thought about that promise . . . and perhaps I think they moved me closer to the disclosure point. I am not saying it did."

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time, admit that the money was the bank money, but did agree to take the police to it.

Petitioner was then left alone for a few minutes in a detention pen. When Detective Beckles came to take him to get the money, petitioner refused to go, whereupon Beckles promised that "if I took him to the money that my contention that the money was mine as a result of gambling winnings would not be—you know, would not be attacked . . ." Fearing that the police might steal his money as they had his watch and gloves at the 30th Precinct,⁷ Lewis insisted that a Mr. Joey Jones, whom he had seen in the 42d Precinct, would have to come along as a witness before he would even consider leading the police to the money.⁸

At this point, Beckles left the room and Corbett came in and told petitioner that he would "be smart to go along with Beckles, because if you don't get that money you are going to answer to me." Corbett then left the room. Beckles reentered and informed petitioner that it had been arranged for Jones to accompany them when they went for the money.

⁷ Petitioner claims that the detective who made him empty his pockets kept his leather gloves and that another officer later confiscated his watch.

⁸ Later, petitioner testified:

"I knew if I didn't [take them to the money], you know, I was going to be beaten again, you know, and like some fellow said, you know, that is the reason I was up there, they was keeping me there for that purpose

"And the fact that they had played this game on me, you know, told me that they was going to—told me that they was not going to contest my saying that the money was mine as a result of gambling monies, and that then after I got back, led them to the money and got back to the station—got back to the precinct, you know, they made it clear, you know, that that was just a sham, you know, this also had an effect on my condition, you know, on bringing me closer to the point where I couldn't resist nothing else, you know."

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At about 2:00 p.m., petitioner, Jones, Beckles, and Cook, Beckles's partner, left to get the money. After the money had been retrieved and they were driving back, petitioner asked Detective Beckles for a receipt. Beckles promised him one when they got to the stationhouse. When they arrived back at the 42d Precinct at about 3:30 p.m., however, Corbett took charge again. He threatened that if petitioner did not shut up about the receipt, "you will get a receipt in the mouth," and told him to "come clean and admit to the robbery now because we've got the money." Corbett then took petitioner to a room where Corbett beat him while he was held by another detective. After this last beating, petitioner confessed to the robbery.

Corbett then took Lewis to a squad room, where Inspector Walsh, Detective Beckles, and several other police officers were gathered. In response to their questions, petitioner gave the answers Corbett had instructed him to before they entered the squad room. Then, after a short period of time in the detention pen, petitioner was taken into another room where he repeated his confession before an assistant district attorney and a stenographer. Petitioner was then taken downstairs and put in a cell, where he remained for the night. At about 10:00 a.m. on the morning of the 19th, he was arraigned.

Dr. Lichenstein's Testimony

Dr. Lichenstein, Chief Psychologist at Kings County Hospital, reviewed and interpreted two reports prepared at Bellevue Hospital in March and June of 1958 wherein the description of petitioner said: "Severe Character Disorder, Sociopath of the Schizoid Type; a type of individual, who, under stress and strain, may develop a psychotic episode in future." Dr. Lichenstein testified that a sociopath, in addition to possessing other maladaptive characteristics, "tends to be rather infantile and immature, has a low

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frustration tolerance and [sic] prone to panic under stress." He described a psychotic episode as a "breakdown in ego functioning or a breakdown in the ability to think clearly . . . usually evidenced in confusion, disorientation." In response to a hypothetical question regarding petitioner's experiences prior to the confessions,⁹ he concluded that it was more probable than not that petitioner had a psychotic break under the assumed conditions. He went on to say that even if petitioner had not experienced a psychotic episode as such, a person with his diagnosis would have suffered a weakening in his power to reason and to resist authority under the described circumstances.

Detective Beckles

Mr. Beckles, called by respondent, gave testimony essentially as follows:

In response to her telephone complaint to the police that a man had threatened her with a gun, Beckles arrived at Ms. Elizabeth Waller's apartment at about 8:30 p.m. on February 17th. As Beckles and Waller were emerging from an elevator in the apartment building on their way to the stationhouse, they encountered petitioner in the hallway. Ms. Waller said that this was the man who had threatened her. Thereupon, Beckles informed petitioner that Waller had made a complaint that petitioner had assaulted her and that he was taking him to police head-

⁹ "Is it possible that the individual described in that report, Doctor, subjected to sudden arrest, 19 hours of continuous interrogation overnight without food and sleep, without counsel from friends or lawyers, or anyone else on his side, subjected to a constant barrage of questioning, interrogation and accusations mixed in with promises of assistance . . . is it possible that the person described in that report under those circumstances had a psychotic break?" The original question contained the additional clause "and subjected to beatings." The question, however, was asked a second time without that clause.

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quarters. Beckles took petitioner to the Detective Squad of the 30th Precinct, where he was questioned first about the alleged assault. Petitioner said that he knew Ms. Waller because she lived in the same building as his mother, but denied any assault.

Detective Beckles, however, had called the 42d Precinct to have them bring any witnesses who might be able to identify the robber of the Bronx bank. This action was prompted by the fact that the complaining witness had stated that petitioner had given her a bag to keep which contained a large sum of money and a gun, and that, upon entering the stationhouse, Beckles had seen fliers relating to the bank robbery. The witnesses were brought down between 10 and 11 p.m., perhaps later. Although he did not take part in the identification proceedings that followed, he was informed that the witnesses had identified petitioner as the bank robber.

After the identification, petitioner was questioned by several detectives on and off during the entire night in the Precinct's "dormitory room." Detective Beckles however, spent only about ten minutes questioning Lewis after he was identified. When petitioner was not being questioned, he was left in the squad room where he sat on a chair. Detective Beckles offered petitioner food during the evening at the time he was offering it to other detectives, but petitioner declined the offer. Beckles does not know if petitioner ate or slept that night. Beckles never struck or beat petitioner.

During the course of the night, petitioner wanted to see a friend who came to the stationhouse. Beckles does not recall whether petitioner actually saw him or not. At one point during the course of the evening, Beckles went out with petitioner, presumably to get the clothing. Beckles went out at some other point with other detectives to search for the bank money in the apartment of a Mr.

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Johnson whose name and address had been obtained from the address book taken from petitioner at the time of his arrest.

By morning, the Borough Commander had decided to turn petitioner over to the 42d Squad on the bank robbery charge. Beckles drove petitioner to the 42d Precinct. There, Beckles continued to speak with petitioner, but did not participate in the interrogation. Beckles told petitioner that if the money was his, he could keep it, but he did not say petitioner could keep it no matter what. At the 42nd Precinct, Beckles also told petitioner that the police at that precinct wanted the money, and that he (Beckles) was going to leave the 42d Precinct and would thereafter have nothing more to do with the proceedings. Eventually, Beckles, together with one of his partners, took petitioner and a friend to retrieve the money.

Detective Corbett

Detective Corbett, the other witness for respondent, testified that sometime after 10:00 p.m. on the evening of February 17, 1958, he received a telephone call from his precinct (the 42d) to the effect that the 30th Precinct was holding someone that they had reason to believe might be connected with a bank robbery he was investigating. After determining that the suspect had a space between his two front teeth,¹⁰ Corbett called the 42d Squad and told them that he was going to the 30th Precinct and that they should arrange for the eyewitnesses to go there too.¹¹ Corbett

¹⁰ One of the eye-witnesses recalled this feature after the identification fliers had been prepared.

¹¹ Corbett later testified that detectives at the 42d Squad had already instructed the witnesses to go to the 30th Precinct, which would explain why at least some of the witnesses arrived at the Precinct between 10:00 and 11:00 p.m. and Corbett not until shortly before midnight.

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arrived at the 30th Precinct shortly before midnight, and then remained all night. Upon his arrival, he was informed that the witnesses who had viewed petitioner had identified him as the robber.

Corbett had a brief conversation with petitioner that night, when petitioner accompanied him and other detectives to a residence in Harlem. Apart from that, Corbett did not interrogate petitioner that evening. During most of the night, Corbett was not with the higher-ranking 30th Precinct officers who were questioning petitioner.

As Corbett, Beckles, and Cook were driving petitioner between the 30th and 42d precincts the next morning, petitioner was questioned further and urged to take the police to the money. Corbett never told petitioner that he would be kept at the stationhouse until they got the money and cannot recall if he ever promised him that he would help him if he revealed the location of the money. After more questioning at the Precinct, petitioner agreed to take Beckles and Cook to the money.

When petitioner returned from getting the money, he requested, but was not given, a receipt. Instead, Corbett took him into a bedroom and "convinced him in my way of thinking, I convinced him that he was really identified." Thereupon, without further urging, petitioner started his confession. After he told the whole story, Corbett took petitioner to the Squad Commander's Office and told him to "tell them now what you told me." He never told petitioner what to say. After petitioner repeated his confession in the squad room, the district attorney and stenographer were called.

Corbett does not recall that petitioner was ever offered any food in his presence or that he ever saw petitioner eat or sleep at either the 30th or 42d Precinct. Corbett testified that he never beat or struck Lewis. He did not advise petitioner of his constitutional rights. While he and his colleagues probably had grounds to arraign petitioner

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when he was turned over to them on the 18th and before he led them to the money, he was not arraigned until the 19th because the investigation had not been finished in time to permit an earlier arraignment.

The testimony given on prior occasions, at trial and at the *Huntley* hearing, is essentially cumulative in nature. Some aspects bear mention, however. Petitioner's only prior testimony was at the trial; he did not testify at the *Huntley* hearing. At the trial, he testified that, at one stretch on the evening of the 17th, they left him in the room with beds for three or four hours. "Once in a while one detective would come in; he would leave, and another detective would also come in. You know, after the other one had left, and about—I lost track of time—but about three or four hours later they began questioning me." Petitioner stated that "when like I said one detective would stay in there for a while with me, and I did sort of doze off in a—in the chair, they'd wake me up."

As for the events at the 42d Precinct, in his trial testimony, petitioner remembered being told that they were charging him with assault in Manhattan, and that the charge would be dropped if he took them to the money. He also said that he confessed "solely because of the threats and the beating and the lack of food," and that neither Detective Corbett nor the District Attorney had promised him anything. Nothing was said about being denied a telephone call¹² or about Mr. Beckles's alleged promise to accept his gambling earnings story if he took them to the money.

¹² At the hearing, Mr. Lewis explained:

"I didn't testify to this at the original trial because I didn't know the value of this kind of testimony and apparently my lawyer, who—at the trial, he was not familiar with all the factors of mental coercion because he didn't instruct me to testify in this regard"

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Beckles and Corbett testified both at the trial and at the *Huntley* hearing. Beckles said nothing at either time about an offer of food to petitioner. At trial, Corbett was able to recall that he might have promised to help petitioner "a little" by promising to "help him if I could when I got to court if he would co-operate with us."

II.

[1] The stubbornness with which petitioner has pursued his constitutional claims during over 18 years of confinement was not matched on February 18, 1958, when he gave in after 19 hours or so and confessed to the bank robbery. Phrasing the test broadly, petitioner's confession violated due process, and was thus inadmissible at trial, if "the totality of circumstances" leading to the confession show that it was not "the product of a rational intellect and a free will. . . ." See *Fikes v. Alabama*, 352 U.S. 191, 197, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957), *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960).

The evidence in the now amplified record demonstrates that petitioner was worn down, that his will was overborne, and that he yielded to a combination of fatigue, despair, and weakness, all produced by his captors and interrogators. This court would so hold upon the evidence and the record if this were the initial habeas proceeding. But our inquiry and the grounds of today's decision have been considerably narrowed by the mandate of the Court of Appeals. Focusing the general principles upon the circumstances of this case, that court has directed us to consider six factors touching the voluntariness of petitioner's confessions. Following that direction, we are driven compellingly toward the granting of the writ.

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[2] The higher Court instructed that six specified allegations, or clusters of allegations, by petitioner would require issuance of the writ if they could be sustained on the remand. Finding them to be sustained, or vindicated so substantially as to permit no other result, we reach the conclusion the mandate requires.¹³

- (1) "He was never once, during the whole period of pre-arraignment interrogation, advised of his right to remain silent or of his right to counsel."

This is undisputed. It is, of course, a solid factor favoring petitioner.

- (2) "According to Lewis he was arrested on the pretense of Mrs. Waller's alleged complaint, held for approximately 38 hours by the police during which time he was neither booked nor arraigned, and questioned during most of the first half of this period."

Although it does not appear that the arrest of the petitioner was "on a pretense," the remainder of the quoted factor, which is the portion that goes after all to the relevant issue of coercion and deprivation, is solidly established by the several records of evidence in this case. It

¹³ The parties have briefed and argued the somewhat open question as to the burden of proof. There is substantial authority that in circumstances like the ones here, the burden is upon the State to establish the voluntariness of the confessions. *United States ex rel. Castro v. LaVallee*, 282 F.Supp. 718, 722 (S.D.N.Y. 1968); *United States ex rel. Smith v. Yeager*, 336 F.Supp. 1287, 1301-02 (D.N.J.), affirmed per curiam, 451 F.2d 164 (3d Cir. 1971); *United States ex rel. Thurmond v. Mancusi*, 275 F.Supp. 508, 520-21 (E.D.N.Y. 1967); *United States ex rel. Senk v. Briereley*, 363 F.Supp. 51 (M.D.Pa. 1973).

As the record stands, however, there is no need to go nearly that far. Accepting respondent's position that the burden is petitioner's (by a preponderance of the evidence), this court reaches the findings and conclusions hereinafter outlined.

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is perfectly clear that the petitioner was held in close and isolated confinement for 38 hours during which he was neither booked nor arraigned. It is equally clear that he was questioned "during most of the first half of this period." As one detective told it, petitioner was "questioned about [the] money all night long", and he kept "insisting . . . all along during the night [that it was his money]", before he was broken on the following day and submitted to the will of his interrogators. Such interruptions as there were served only to accentuate the thoroughness of his subjugation and the futility of any attempt to resist.¹⁴

The extraordinary delay in arraignment, condemned by state no less than federal procedural law, was totally devoid of justification, at least once the night had passed.¹⁵ As is evident from Detective Corbett's testimony, the delay was for the clear and explicit aim of having the petitioner under total control for the purposes of locating the money and extracting a confession before he was allowed access to anyone else or to any of the forms of the law's protection. In light of the eye-witness identifications, it is obvious that the continuing "police interrogation was essen-

¹⁴ The interruptions included two, and perhaps three, trips with, and at the instance of, various detectives. The first was to petitioner's residence, which the police searched and from which they "seized" some clothes and other personal belongings. At some point in the early hours of the morning, detectives searched the apartments of two of petitioner's friends after obtaining their names and addresses from petitioner's address book. It is not entirely clear whether petitioner accompanied the detectives on this mission, but he was at least aware that it took place. The final "diversion" was the trip with Beckles, Cook, and Jones to Manhattan to retrieve the money. The car ride from the 30th to the 42d Precinct on the 18th does not qualify as an interruption because the detectives questioned petitioner throughout.

¹⁵ Both detectives Beckles and Corbett testified that they thought arraignment would have been impossible before the morning of the 18th when the Criminal Court reopened.

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tially incriminatory rather than merely investigatory in nature," *United States ex rel. Castro v. LaVallee*, 282 F. Supp. 718, 724 (S.D.N.Y. 1968), and must be condemned as such. See also *United States ex rel. Montgomery v. Mancusi*, 338 F.Supp. 1247, 1251 (S.D.N.Y. 1972).

- (3) "During his extended period of detention before and after confession, Lewis was not allowed to make any telephone calls, was not allowed to see anyone and, with one minor exception, saw and spoke to no one but the police."

Again, the record establishes conclusively the propositions in the quoted statement. The petitioner was completely walled off during the many hours of his custody. It was made clear to him that his situation of close and isolated custody could not be expected to change until he had done the officers' bidding. The "minor exception" from the condition of isolation from friends or family was solely a bargaining ploy to "encourage" Lewis to lead the police to the money. Solely for this purpose, they acceded to petitioner's request that his friend Jones could accompany them as a kind of witness. So far as that is an "exception" at all, it is not one that diminishes the impact of petitioner's totally controlled environment during interrogation.

- (4) "Lewis was continuously interrogated throughout the night of February 17 and on into February 18 on an intermittent basis without being given any real opportunity to sleep or any substantial food."

Once again the record is clear to the point of being substantially undisputed on this significant set of conditions. This court has noted earlier the admittedly continuous character of the interrogation. There is no real question that the petitioner was deprived of food and sleep, with all the debilitating consequences of these conditions.

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Some equivocal intimations that food was brought into or out of the room where petitioner was held are without significance for the main point that petitioner was neither given any food nor given any reason to hope that a request for it would be effective. Detective Beckles's testimony at the hearing that he offered petitioner food at the 30th Precinct is largely, if not totally, discredited by his failure to recall this act of benevolence at either the trial or the *Huntley* hearing.

Petitioner testified that he had not slept at all between the time of his arrest and his confession. None of respondent's witnesses could contradict his contention. To be sure, petitioner's trial testimony that he had been left alone for three or four hours on the night of the 17th in which he "dozed off" from time to time, only to be awakened on each occasion by one of his interrogators, casts doubt on his broader claim here of total sleep deprivation. However, it remains clear that petitioner slept very little, if at all, between the time of his arrest and confession.

In the end, the court finds that petitioner was in fact left to suffer the pangs of hunger and the impairments caused by sleeplessness. The effects of such deprivations can only have impaired his ability to think straight and resist pressure. They weigh heavily in the picture pointing toward the involuntariness of petitioner's confession.

- (5) "Lewis, at the time of his confession, was a young 22-year old black man of limited education with apparently little prior experience with police methods, thus rendering him particularly susceptible to police pressure."

At age 22, the petitioner was certainly not as young as some whose names have been identified with confessions held invalid because their youthful wills were "overborne." Nevertheless, the factor just quoted, already held signifi-

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cant by the Court of Appeals, remains a substantial one in the case. We have been repeatedly instructed that "the process of determining voluntariness involves more than 'a mere colormatching of cases'" *Mancusi v. United States ex rel. Clayton*, 454 F.2d 454, 456 (2d Cir.), cert. denied, 406 U.S. 977, 92 S.Ct. 2413, 32 L.Ed.2d 677 (1972); *Reck v. Pate*, 367 U.S. 433, 442, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Beecher v. Alabama*, 389 U.S. 35, 38, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967).

Though he was all of 22, this petitioner was diagnosed by contemporaneous psychological evaluations as a sociopath and "a type of individual, who under stress and strain, [might] develop a psychotic episode in [the] future." Dr. Lichenstein testified that a sociopath "tends to be rather infantile and immature" and that it was more probable than not that petitioner "suffer[ed] a psychotic episode" in the conditions of extended custody and interrogation. While the court does not fully accept Dr. Lichenstein's conclusion, it seems highly likely that petitioner was relatively young (emotionally and intellectually as well as chronologically), unstable, and vulnerable at the time he was interrogated. Such characteristics rendered him particularly susceptible to police pressure.

It is true, as respondent stresses, that petitioner had already been imprisoned once for a serious criminal offense, and was thus no stranger to the forces of the criminal process. It does not follow by any means, and the record does not suggest, that he had significant "prior experience with police methods." So far as the law is concerned, "even a long criminal record" is not sufficient to erase or overcome such problems of immaturity, ignorance and simplemindedness as our Court of Appeals identified, and as the Supreme Court has held important, for decision of questions like the one now considered. See *Davis v. North Carolina*, 384 U.S. 737, 742, 752, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966).

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- (6) "The police detectives made various promises to petitioner, including an offer to 'help' him with his case if he confessed and a pledge that his claim of ownership would not be challenged if he would only retrieve the money."

Once more, on this final topic, the proof is ample in favor of the petitioner. Rationally, in the comfort of the courthouse or a lawyer's office, it seems absurd to suppose that police would have told the petitioner "his claim of ownership would not be challenged" even if it turned out that he had robbed the money from a bank. Nevertheless, the record makes it evident that this is substantially what the police actually said, and it is even more clear that this is what they contrived to lead him to believe. Indeed, the Court of Appeals in its first review of this case seems to have found from the existing record a promise by the officers "to accept his claim that the money in the briefcase was gambling winnings . . ." 520 F.2d at 899. It has been evident from the time of petitioner's trial that the detectives who interrogated him were quite willing to lull and pressure him by promises of friendly assistance.¹⁶ The several records of testimony are replete with specific promises of "help" in return for a confession. In sum, the sixth and last of the Court of Appeals standards is met beyond any serious question.

It follows, as the Court of Appeals said it should, that petitioner's "confession was obtained in violation of his Due Process rights."

¹⁶ Typically, one of the detectives quoted himself as saying: "Now, you have to put your trust in somebody, and we are the ones who can help you," and, the officer continued, "it was right after that that we sat down and he started to tell me" about his commission of the bank robbery.

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III.

The respondent maintains that even if petitioner's confessions were involuntary, as the court has now held, their admission at his trial was harmless error. Assuming that the Circuit has not foreclosed this issue by its mandate,¹⁷ this court rejects the argument on the merits.

It has been held that the admission of a coerced confession can, in rare circumstances, constitute harmless error. See *United States ex rel. Moore v. Follette*, 425 F.2d 925 (2d Cir.), cert. denied, 398 U.S. 966, 90 S.Ct. 2180, 26 L.Ed.2d 550 (1970) (prior untainted confession also in evidence). This is not such an extraordinary case.

In addition to the involuntary confessions, the evidence introduced at petitioner's trial consisted of (1) the testimony and in-court identification by seven eye-witnesses, (2) the testimony of Elizabeth Waller that Lewis asked her to store a briefcase for him, which she later learned contained large amounts of packaged money, (3) a matchbox and sheet of paper upon which petitioner allegedly made, or directed Ms. Waller to make, computations as they counted the money contained in the briefcase, (4) testimony by Beckles and Corbett that petitioner had led them to approximately \$8,000 in cash, including two \$5 bills that had been marked by one of the bank tellers, (5) the money itself, and (6) the testimony of the patrolman who found the stolen car allegedly used by petitioner in the bank robbery.

¹⁷ Having concluded that there were unresolved factual issues as to mental and psychological coercion, the Court of Appeals remanded for a hearing "[s]ince a state court conviction tainted by an involuntary confession cannot stand under the Due Process Clause. . . ." 520 F.2d at 904. Having failed to raise the question of harmless error in the Court of Appeals, the respondent might be held to have waived the contention.

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[3, 4] The case against petitioner was strong even without the confessions. But not all of the other evidence was itself free from taint and other weaknesses. Whether or not the fact that Lewis led the police to marked money taken from the bank and the money itself are regarded as additional "confessions,"¹⁸ it is clear that they at least suffer from the same constitutional taint, see *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and must be disregarded as independent evidence. The testimony regarding the stolen getaway car must be discounted because, without petitioner's confessions, there would have been nothing to link him to the car. Similarly, while Waller's testimony and the computation slips were circumstantial evidence the petitioner had robbed the bank, they did not conclusively establish the origin of the money since petitioner never told Waller where he got the cash.

[5] After disregarding the tainted evidence and discounting the evidence otherwise dependent upon the confessions, it is obvious that the court cannot say that "beyond a reasonable doubt," the confessions "did not contribute" to petitioner's conviction. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See also *United States ex rel. Moore v. Follette*, *supra*, 425 F.2d at 928. To be sure, the eye-witness identifications, while not perfect,¹⁹ were powerful independent evidence of

¹⁸ See note 2 *supra*.

¹⁹ After remand, petitioner attempted to inject the further claim that his conviction was based upon tainted identifications in court following impermissibly suggestive lineups. If the court were to reach that issue, it would be resolved against petitioner. While it appears that the out-of-court identifications were indeed improper, in light of the witnesses' degree of certainty and the extensive cross-

(footnote continued on following page)

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petitioner's guilt. But nothing is quite so damning as a defendant's own admission of guilt. Here, unlike the situation in *United States ex rel. Moore v. Follette, supra*, all of petitioner's confessions were involuntary. See *United States ex rel. Montgomery v. Mancusi, supra*, 338 F.Supp. at 1252.

In all these circumstances, the court holds that the admission of the confessions was harmful constitutional error.

Accordingly, the petition should be, and it is, granted. Petitioner will be released from custody unless the State brings his case on for retrial within sixty days.

It is so ordered.

(footnote continued from preceding page)

examination at trial, the in-court identifications did not violate due process and taint petitioner's conviction. See *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). However, the out of court deficiencies do diminish to some degree the evidentiary value of the in-court identifications.

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Opinion of the Supreme Court of Bronx County dated March 24, 1970 and entered March 31, 1970 denying relief after a confessions-voluntariness hearing (McCaffrey, J.)

Supreme Court : Bronx County
Trial Term Part XIV

Ind. No. 219-58 Hearing

—♦—
The People of the State of New York

—against—

Alfred Lewis,

Defendant.
—♦—

McCaffrey, J.:

Defendant was convicted in 1958 following a trial by jury and thereafter sentenced to a term in State's Prison. Pursuant to an order of this Court, he was accorded a hearing addressed to the issue of the voluntariness or involuntariness of his confession or confessions introduced at the trial. At the hearing the People introduced the trial minutes and rested. Defendant's attorney requested the Court to limit perusal of the trial minutes to the testimony of Detectives Beckles and Corbett and the defendant. In response the Court advised that perusal of the trial minutes would be limited to those pages of testimony having to do with the voir dire covering the statements made by defendant to Detectives Beckles and Corbett.

At the trial, Detective Beckles testified that on February 17, 1958 about 8:30 p.m. at an address in New York County on the complaint of one Elizabeth Waller he took defendant into custody. During the intervening time

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until the next day about 1 p.m. he was with the defendant except for a brief period of time. The next day, he, Detectives Alfano and Corbett and the defendant arrived at the 42nd Squad (Bronx). At the 42nd Squad he talked with defendant. Defendant agreed to show where an amount of money was, claimed by defendant to be proceeds from gambling. Defendant requested Detective Cook and a friend (not otherwise identified) of defendant to accompany them. They left a little after 2 p.m. Locating the money, they returned to the 42nd Squad. The money was turned over to Detective Corbett, defendant requesting a receipt. Later he overheard defendant in conversation with Deputy Chief Inspector Walsh, Detective Corbett, Detective Cook and other unnamed detectives and F.B.I. being present; the time being approximately 3:15 or 3:30 p.m. No officer struck defendant. After the questioning he returned to the 30th Squad. He did not question defendant at the 30th Squad about the robbery. He knew that defendant was questioned but did not recall by whom. As far as knew defendant was not beaten at the 30th Squad.

At the trial Detective Corbett testified that he did not question defendant at the 30th Squad. At the 42nd Squad he interrogated defendant from about 1 p.m. to 2 p.m. Present were Detectives Beckles and Cook. Then defendant was taken to an address in New York County. On his return he was questioned by Detective Corbett for about 10 minutes. He didn't beat defendant during that time; didn't use profanity; made no threats. Then defendant and he went into the room where Deputy Chief Inspector Walsh, Detectives Beckles and Cook and other members of the Department and some F.B.I. men were present. Corbett told defendant to tell them exactly what he had told Corbett. During the 10 minutes he didn't punch defendant in the stomach; molested him in no way; no hand was laid on any portion of defendant's body.

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At the trial on the voir dire defendant testified that at the 30th Squad he was questioned by Deputy Chief Inspector Walsh and Detective Corbett about the location of a sum of money. While held by a couple of detectives, he was hit in the face, the right and left cheeks and the chin but not the nose by Corbett, sometimes in the stomach and groin by Corbett and on the lips by Walsh. After an interval of about 3 or 4 hours, questioning was resumed, and the Deputy Chief Inspector and some other detectives (not identified) (Corbett not being present) began beating him again and making threats and continued until the next morning. He had no sleep; nothing to eat. Throughout, he didn't make any statement other than that he had some money that was his. The next day he was taken to the 42nd Squad by three detectives including Beckles and Corbett, arriving about noontime; he had not eaten. Corbett and a couple of other detectives started to beat him so he told where the sum of money was. Accompanied by Detectives Beckles and Cook and a friend of his (not named) he went to the location of the money. On returning to the 42nd Squad another detective was in the room with Detective Corbett and him. The detective (not identified) held him while Corbett hit him 3 or 4 times in the stomach; then a couple more times. He was in the room about half an hour. Then Corbett took him to another room where he was questioned by Deputy Chief Inspector Walsh, Corbett being present. Then he was placed in a detention cage. He tried to sleep on the floor. He had nothing to eat except candy bars brought in by a uniformed officer (at defendant's request). He had a bowl of soup after arraignment the morning of the 19th and again shortly after arrival at the jail, his first solid food in the Bronx County jail the night of the 19th. At his arraignment in Magistrates Court he did not mention to the judge that he had been hit. He told an unnamed corrections officer that he had been hit by the police. He was not examined by

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a doctor February 19th at the jail. He had red marks on his stomach. At the first examination by a doctor 4 or 5 days later he had slight red marks. The first time that he had gone to the doctor was the next day or February 20th. When he was questioned by an Assistant District Attorney, a stenographer being present, he was not threatened or was he told what to say.

At the trial on the voir dire a Dr. Karpowski testified that he examined defendant February 19, 1958; the defendant had no complaints; had no pathological findings. February 20 defendant did not tell that he had been beaten up on February 17. February 24 defendant complained of indigestion and constipation. A week or two later defendant complained he had pains in his back; that he had been beaten. On February 26 defendant complained of pain in the chest and back, claimed to have resulted from being beaten up on February 17. Examination revealed no pathological signs. On February 28 defendant complained of pain in the upper lumbar region and hematuria after alleged beating on February 17. The hematuria disappeared the following day. The defendant did not remember whether hematuria occurred more than once. On admission the complainant did not complain of hematuria. He abdomen was soft, no tenderness, in the kidney region. On March 3 defendant complained of pain in the perineum and epigastrium; there were no objective findings.

At the hearing defendant elected not to testify but to rely on his testimony on the voir dire at the trial. One, Louis Johnson testified in defendant's behalf that on Tuesday in February 1958 he saw the defendant in the 30th Precinct in Manhattan; that he was in a room with defendant for only a few minutes. He heard defendant in another room in loud conversation. Later on the same day, he saw defendant in the 42nd Precinct in the Bronx once shortly; then on leaving the

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precinct he saw the defendant lying on the floor. Asked if there was anything he could do for him, defendant said, no. He didn't see any marks on defendant's body. He saw defendant pushed and told to shut up and hit in the stomach like, just pushed away like, by one uniformed officer about 15 or 20 minutes after he had arrived in the 42nd Precinct. He acknowledged that he was convicted for policy and convicted for possession of a hypodermic needle; that he knew defendant about 25 years, considered himself a friend although he had not seen the defendant in five years. Joseph Anthony Jones testified in defendant's behalf and said that in 1958 he lived in a room adjacent to the room in which Louis Johnson lived. He, Jones, was arrested on a Tuesday morning 3 or 4 hours after Johnson was arrested. Taken to the 30th Precinct he remained until 1 or 2 p.m., then was taken to the 42nd Precinct in the Bronx where he remained until 4 or 5 o'clock in the afternoon. In the 30th Precinct he saw the defendant briefly once in a quick shuffleby. At the 42nd Precinct he saw the defendant about four times. He was taken with the defendant to Manhattan and back to retrieve a sum of money. The first time he saw defendant at the 42nd Precinct was a good two minutes when he sort of drifted into the room where defendant was lying on the floor; tried to speak to him but defendant did not respond. The next time he saw 4 or 5 officers who had defendant in a carrying position straight up, taking defendant in a dragging position to a room across from where the witness was sitting. The third time, the defendant was brought to a car where he, Jones, was already seated and they were taken to Manhattan. The last time he saw defendant he was lying on the floor of the cage. He acknowledged prior conviction for petty larceny six times during the last seven years. Says he knows the defendant for 20 years and that he had not been requested to testify at the trial in 1958.

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At the hearing in rebuttal Detective Beckles said that on February 17, 1958 he was assigned to the 30th Detective Squad (Manhattan); that he arrested defendant approximately 8:30 p.m. On February 18 he was in the 30th Precinct from 6:30 a.m. until 11:30 a.m. but does not recall having seen Louis Johnson. About 11:30 a.m. he left the 30th Precinct with Detectives Crobett and Alfano and defendant for the 42nd Precinct (Bronx). At the 42nd he spoke to defendant for 15 or 30 minutes. During that time Detectives Cook and Alfano came into the room and left. No one in his presence beat the defendant, shove him or lay a hand on the defendant. He himself did not beat, shove or lay a hand on defendant. Then Detective Cook, defendant and friend of defendant's and he went to a location in Manhattan where \$8,000 was recovered, defendant saying it was his money. Returning to the 42nd Precinct about 3:00 or 3:30 p.m. defendant was interrogated by Detective Corbett. At no time did he see defendant being hit, shoved or pushed. Defendant was not questioned by any uniformed patrolman. He does not recall seeing Louis Johnson at the 42nd Precinct. He says that the defendant was questioned the night of February 17 at the 30th Precinct concerning the robbery. Detective Corbett also testified in rebuttal and said that on February 18 he had escorted the defendant, accompanied by Detectives Beckles and Cook from the 30th Squad to the 42nd Squad. He does not recall having seen Louis Johnson in the 30th Precinct. Johnson was not transported from the 30th to the 42nd Precinct. He, Corbett, did not interrogate the defendant prior to the 42nd Precinct. At the 42nd, he, Beckles, and Cook questioned defendant regarding a sum of money; thereafter the defendant left with Beckles and Cook. On return, the defendant said "it is my money and I want a receipt." As the money was being counted in another room he questioned defendant for about 10 minutes

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in the dormitory. Thereafter, defendant was requested to relate to Deputy Chief Inspector Walsh what he had told Corbett; defendant did so and was at the time asked certain questions regarding the stickup, which he answered. Thereafter defendant was questioned by an Assistant District Attorney and his stenographic statement taken. During the time Corbett first arrived at the 30th Precinct until the defendant was booked, no officer or F.B.I. agent pushed, shoved or hit or in any way harmed the defendant. Defendant had no marks on his body and at no time was he lying on the floor of the detention cell. Defendant, on leaving the 30th Precinct, had no difficulty walking; skipped over a snow bank; his eyes were not bloodshot. Detectives Beckles and Cook accompanied defendant to recover the money but he does not recall a third person. He does not know if a third person was in the squad car at that time.

It is noted that Louis Johnson, with two convictions, and Joseph Anthony Jones, with six convictions, both professing to be friends of defendant, claim they were in the 42nd Precinct on February 18th, saw the defendant and on at least one occasion spoke to defendant; further, that Jones claims to have accompanied defendant to Manhattan and back in the company of detectives. From their testimony it is a fair inference that defendant was aware of Johnson's and Jones' presence in the 42nd Precinct on February 18th. Yet at the trial and during the voir dire defendant named no names and either did not give the name or names of professed friends to his eminent attorney then representing him, or, if he did, said attorney saw fit not to call upon the two alleged witnesses who now, after almost 12 years, are called upon by defendant to relate what they allegedly saw on February 18, 1958.

It is further noted that defendant's own version on the voire dire at the trial is in conflict with the testimony

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of Detectives Beckles and Corbett, and Doctor Karpowski as is the testimony of Louis Johnson and Joseph Anthony Jones at the hearing. Defendant does not say he complained to the arraigning magistrate or the Assistant District Attorney, both readily identifiable, but does say he complained to an unidentified Correction Officer.

This Court is satisfied beyond a reasonable doubt that the statements made by defendant to Detective Beckles and to Detective Corbett, respectively, on the 18th of February 1958 at the 42nd Precinct were voluntarily made and were not the result of physical coercion of any kind. Accordingly, the motion is denied. This constitutes the order and decision on the motion.